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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 473.

ELMER J. BENES,
Individually, and as an Officer of
E. J. Benes & Company, Inc.,
Petitioner,

vs.

SUMNER CANARY,
as United States Attorney,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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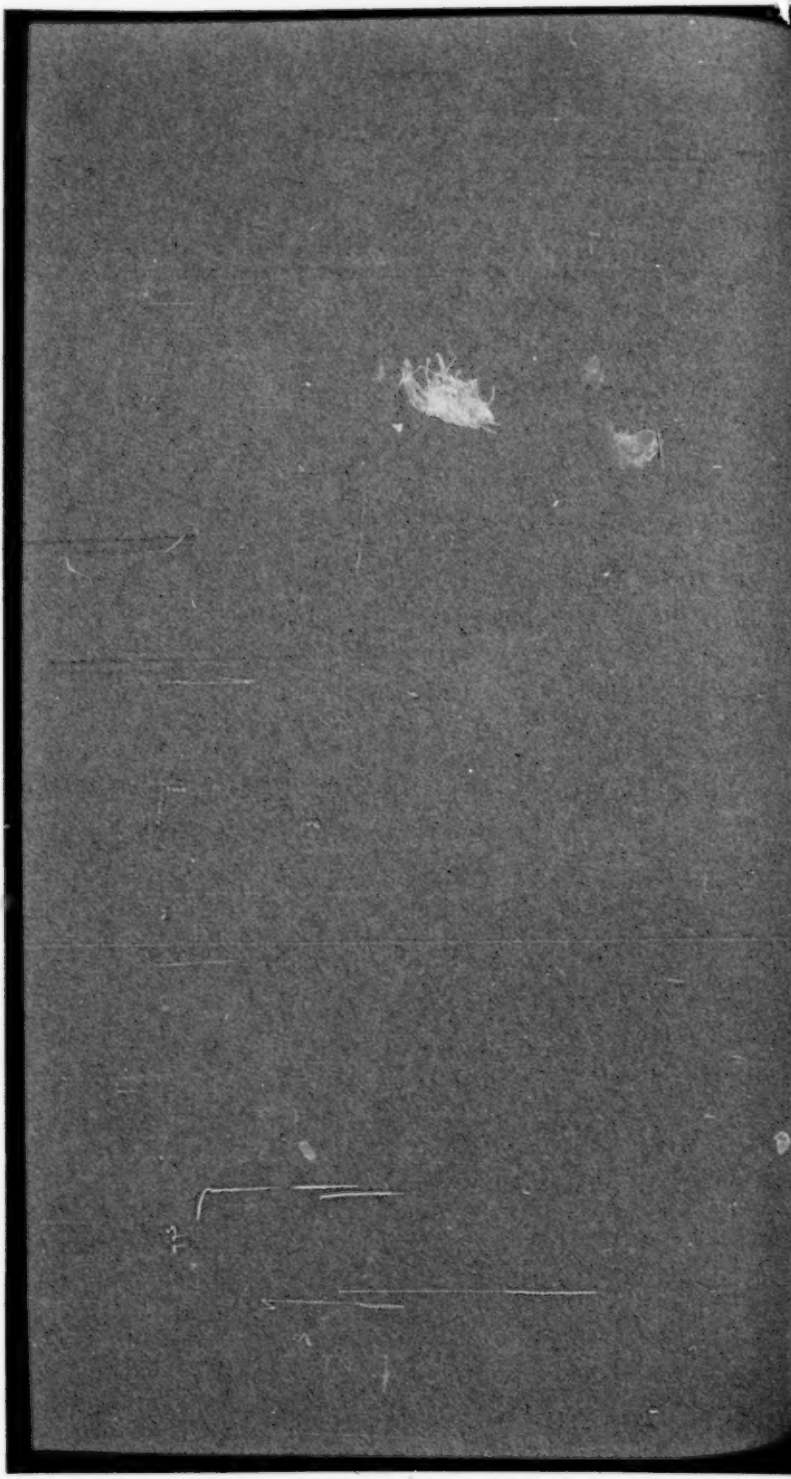

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Elmer J. Benes, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on July 20, 1955.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is printed in the appendix, *infra*, p. 23.

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported in 224 Fed. 2d 470. Appendix, *infra*, p. 29.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 20, 1955. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, COURT RULES AND STATUTES INVOLVED.

Amendment IV—Searches and Seizures.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V—Self-incrimination.

"No person * * * shall be compelled in any criminal case to be a witness against himself, * * *."

Rule 25 (CA 6), relating to Oral Argument, provides:

"1. Cases will not be taken upon briefs, without oral argument, except by permission of the court on special application made before the case is reached.

2. The appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument."

28 U. S. S. § 1254 (1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

QUESTIONS PRESENTED.

1. Whether a Revenue Agent, who has no search warrant or other legal process, may, in the absence of a taxpayer, enter taxpayer's office and without obtaining permission from any employee, or the taxpayer, examine the contents of the taxpayer's filing cabinets and remove evidentiary matter from them and use the same to prosecute the taxpayer.

2. Whether the United States may after the Secretary of the Treasury publicly promises immunity to any taxpayer if he discloses additional tax liability, thereafter use the information induced by said public promise, to prosecute the taxpayer.

3. Whether the Circuit Court of Appeals whose published rules provide "cases will not be taken upon briefs without oral argument, except by permission of the Court on special application made before the case is reached," enter a judgment upon the case when neither party has requested that it be decided upon briefs alone.

4. Whether the Circuit Court of Appeals is required, when their rules provide, "the appellant in this court shall be entitled to open and conclude the argument," may enter final judgment without affording the appellant an opportunity to argue his case.

STATEMENT.

The petitioner, Elmer J. Benes, is an officer of the E. J. Benes & Company, Inc., general contractors, whose business has been to erect industrial buildings. During the years from 1945 to 1950 inclusive, the petitioner, as head of the company, constructed approximately 200 such buildings. These also were years in which the building construction industry was competing with each other for

construction workers. In order to hold his men, whether they were carpenters, laborers, bricklayers, or any other craft, when there was no work for the men immediately on customers buildings, he would send these mechanics out to help construct a house on land that was in the name of his wife. It was uncontradicted during the trial that there were times when there were 70 men working there without supervision, and others when there was only one and that there were months when no one worked on the house. More than three years went by before the house was completed, and when done, the actual out of pocket expense to the corporation to build the house was in the neighborhood of $180,000.00, and the actual value in the market of both land and building based upon appraisals which were uncontradicted at the time of trial, was less than $80,000.00.

The cost of the labor and material that went into this house was carried on the books of the corporation as part of the costs of other jobs, i.e., when any craftsmen finished in building A, and they were waiting for work to present itself on B, they were carried on building A's costs sheets while they were working on the house, or if work ran out while on building B for several days they were continued on the payroll of B and worked on the house until such time as they were re-assigned to building B or another commercial building.

The real purpose was to keep the men employed lest they would go on another contractor's payroll and refuse to return when needed.

However, all the invoices and all of the labor costs were contained in separate files and after the taxpayer decided to move into the house he consulted with a certified public accountant about how the matter should be handled, and it was the opinion of the certified public

accountant, McQuilkin, that Amended Income Tax Returns should be filed showing the cost of construction in each of the years involved. This conversation occurred during the month of April, 1951.

Before the certified public accountant had prepared the amended income tax returns, a revenue agent appeared May 1st, 1951 at the office of the company and examined the corporation's books and records for the fiscal year of 1950, and at the end of the day publicly stated to the taxpayer and others in the office that he was giving the corporation a "clean bill of health."

Seven days later amended tax returns for the corporation for the years 1947-8-9-50 were filed and the additional taxes were paid. These tax returns were not based on the market value of the house, but were based entirely on the actual cost to the corporation.

On August 2, 1951, Ben Lewitt, a Revenue Agent, made his first visit to the taxpayer at his office and informed the taxpayer that it had been decided that his was a civil case and that he would like to examine the books to reconcile the figures that were contained in the amended tax returns of the corporation. Relying on the representations of Agent Lewitt and the Secretary of the Treasury, the petitioner herein gave to the agent all the invoices and payrolls that were involved in the construction of the house.

The next occasion that the Petitioner saw Lewitt was on August 23, 1951, when the petitioner entered his office in the Terminal Tower Building in the City of Cleveland, Ohio, and saw Agent Lewitt going through his filing cabinets. The very instant that the Petitioner entered the agent closed the file drawer, put on his hat and fled from the office. Then and then only does the evidence show that

Benes found out by inquiry that the Agent Lewitt had been searching his files without his consent or authority.

On September 23, 1951, Agent Lewitt, who had informed the taxpayer that it was entirely a civil matter and that he had nothing to worry about, telephoned the taxpayer and told him to hire a lawyer.

On March 12, 1954, a criminal complaint was filed in the United States District Court for the Northern District of Ohio, Eastern Division, charging Elmer J. Benes with having violated the internal revenue code within this district by filing a personal income tax return for the year of 1947, and at the same time the District Attorney informed representatives of Elmer J. Benes that he intended to proceed both on the personal income tax returns as well as the income tax returns signed by Elmer J. Benes as the officer of the E. J. Benes & Company, Inc. for years 1947-8-9-50.

Thereafter, on April 12, 1954, Elmer J. Benes, as an individual and as an officer of the E. J. Benes & Company, Inc., brought an action in the District Court seeking an injunction and mandatory writ to return to him all books, records and information obtained by the agent Lewitt without a search warrant and without permission, and an injunction against the District Attorney from using before the United States Commissioner or the Grand Jury in any criminal proceeding the books, records, papers or other evidentiary matter belonging to Elmer J. Benes or the E. J. Benes & Company, Inc., and that all such books, papers, records and other evidentiary matter be suppressed as evidence and be returned to Elmer J. Benes and the E. J. Benes & Company, Inc.

On October 25, 1954 an order was issued restraining the U. S. Attorney from using evidence alleged to have been unlawfully obtained pending final hearing.

On March 30, 1955 an order was issued dissolving the temporary restraining order and further ordered the complaint be dismissed.

On April 21, 1955 the transcript of the proceeding was filed and appeared perfected to the Sixth Circuit Court.

On June 20, 1955 the Petitioner herein filed his brief with the Circuit Court.

On July 15, 1955 the defendant filed his brief with the Sixth Circuit.

Five days after this brief was filed—the Sixth Circuit filed its printed opinion without giving petitioner an opportunity to argue his case as provided in Rule 25 (CA 6).

REASONS FOR GRANTING THE WRIT.

I. Unlawful Search and Seizure.

When the Sixth Circuit Court of Appeals held that a Revenue Agent had the right to inspect, seize and confiscate records, papers and information contained in the filing cabinets of Elmer J. Benes when he was not at the office, the Circuit Court ignored the decision of this Court rendered in *Gouled v. U. S.*, 255 U. S. 298 at page 306:

> "* * * Whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth or through social acquaintance or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment * * *."

The evidence in this case, which was uncontradicted, was that the Revenue Agent Lewitt met Elmer J. Benes for the first time on August 2nd, 1951. The next time

Elmer J. Benes saw Lewitt was approximately August 23rd, 1951, when Elmer J. Benes came into his office in the afternoon and saw him searching through the contents of filing cabinets. Upon being discovered by Benes, Lewitt closed them, put on his hat and left the office. His departure was immediate. Lewitt never denied his running from the office as outlined here. As Benes testified "he never gave me a chance to object" (R. 46a).

Lewitt did not state under cross-examination that he had permission to go into the files and examine the contents and remove any or all material that he chose from them.

> "Q. The question, please. Did you tell them [Benes employees] that you had Mr. Benes' permission to go into those files?
>
> A. I don't recall whether I told them, but I believe that it was understood or Mr. Benes informed me that he would advise his personnel of the fact that I was authorized to be there.
>
> Q. But you are not sure of that?
>
> A. Well, I am certain that I was authorized to be there [in the files] because no one ever made any objection nor ever told me that I wasn't to look at anything, any record of any kind." (R. 53a.)

The Circuit Court of Appeals took this assumption of right on the part of Lewitt to be factual and in so doing their judgment was in direct conflict with the decision of this Honorable Court rendered in *Gouled v. United States*, 255 U. S. page 288, referred to above. Any effort to use such evidence would be forcible and compulsory and be in violation of the liberties guaranteed to Elmer Benes under the 4th Amendment and 5th Amendment. Not only is this decision at variance with the decision of this Honorable Court, but holds opposite to the decision rendered by the 4th Circuit Court in *Karwicki v. United*

States, 55 Fed. 2d, 225 and 226, wherein that court following the *Gouled* case held that:

> "The government must show consent that is 'unequivocal and specific.' "

The judgment of our Circuit Court is also directly opposite in its effect from the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Judd v. United States*, 190 Fed. 2d, 649, where the court held that "searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the 4th Amendment * * *. True the obtaining of a warrant may on occasion be waived by the individual, he may give his consent to search and seizure but such a waiver of consent must be proved by clear and positive testimony and it must be established that there was no duress or coercion actual or implied."

The judgment of the 6th Circuit is at variance with the *United States v. Kelih*, D. C. S. D. Illinois, 272 Fed. 484, in which case it was held:

> "The government must show a consent that is 'unequivocal and specific'."

In the *Judd* case it was held that the burden on the government is particularly heavy in cases where the individual is under arrest. Non-resistance to orders of searches of the police is not unaffected in such a situation. True consent free of fear or pressure is not so readily to be found.

As we have pointed out to this Honorable Court, Special Agent Pearce (R. 64a) admitted that the information that Lewitt obtained by searching the files was absolutely necessary in order to maintain a criminal case. We also wish to point out to the Court that Lewitt admitted only talking to Benes face to face but once, on August 2, 1951,

and therefore all of the information which he obtained that was necessary to perfect a criminal case was obtained from the files in the absence of Elmer J. Benes.

This case falls short of the judgment in *Nueslein v. District of Columbia*, 115 Fed. 2d 690, where the court said:

> "Before a court holds that a defendant has waived his protection under the 4th Amendment 'there must be convincing evidence to that effect.' "

In our case, Benes and his office employees all stated unequivocally that they never gave consent to Lewitt to examine the contents of the filing cabinets.

The credibility of the witnesses is not the central issue in this case. The real issue is whether the evidence offered by the government taken at full value meets the recognized standard. We contend that there has not been sufficient showing of true consent, to meet the standards set by this Court, standards which we believe must also be maintained and enforced by the trial and appellate courts.

The Supreme Court and Circuit Courts, other than the Sixth, have repeatedly held that evidence obtained in the manner that occurred in this case was non-admissible and motions to suppress should be granted. In an almost identical situation it was held in the *United States v. Guerrina*, 112 Fed. Supp. 126-128, that an agent was not permitted to go into filing cabinets in the absence of the taxpayer and the court held:

> "The agents did not obtain from Miss Jones permission to examine the contents of the filing cabinets nor did they ever obtain from the defendant permission to do so."

The Sixth Circuit predicated its judgment on the hypothesis that if Lewitt had asked for permission to inspect the contents of the files he would have been given that per-

mission by Benes and that therefore Benes has no reason now to complain that his constitutional guarantees are violated. If a man enters a store with the intent to take bread from the bread case and burglarized the bread case, he is guilty of burglary and larceny notwithstanding the possibility that if he had asked the storekeeper for bread he would have been given all he wanted. When Lewitt in the absence of Benes entered his office to take whatever information or records from the files that would be useful in a criminal case he behaved in the same manner as one entering a store to take bread without permission.

In this case there was no search warrant, no warrant of arrest, subpoena, or administrative subpoena, therefore, as this Court stated in the *United States v. Jeffers*, 342 U. S. 48, 51-52:

> "Officers instead of obeying this mandate have too often as shown by the numerous cases in this Court taken matters into their own hands and invaded the security of the people against unlawful search and seizure."
>
> "* * * the officers not only proceeded without a warrant or other legal authority, but their intrusion was conducted surreptitiously and by means denounced as criminal."

This Court when speaking of the absence of an administrative subpoena stated in *Cudahy vs. Holland*, 315 U. S. 357, 364:

> "Without the subpoena that power is in effect a power of inspection at the employer's place of business, to be exercised only with his *consent*."

This Court has spoken many times on unlawful search and seizure in situations similar to this:

> *Go-Bart Importing Co. vs. United States*, 282 U. S. 344;
>
> *Gouled vs. United States*, 255 U. S. 298;

Boyd vs. United States, 116 U. S. 616;
Hale vs. Henkel, 201 U. S. 43;
Silverthorne Lumber Co., vs. United States, 251 U. S. 385;
Marron vs. United States, 275 U. S. 192.

Under no circumstances did the Agent in this case have a right to go into the filing cabinets to search out the records, since the records were merely corroborative evidence to the confession (amended income tax returns) induced by the Secretary of the Treasury's promise of immunity. The records were of evidentiary value to secure an indictment. The records in themselves in the filing cabinets were not the means of effecting or committing an offense. It therefore follows that the possession of these files could only be obtained by either administrative subpoena or by consent expressly granted. Such a conclusion is inescapable under the principles laid down in *Gouled vs. United States,* 255 U. S. 298; *United States v. Lefkowitz,* 285 U. S. 452.

II. Voluntary Disclosure.

The Voluntary Disclosure Policy of the Treasury Department was put into effect on September 8, 1919 and reads in part:

> "In cases in which voluntary disclosure is made of deficiencies through intentional evasions which if discovered by internal revenue officers would be made the basis of criminal prosecution, it will be the policy of the Bureau to impose the maximum penalties and to consider offers in compromise of the criminal liability instead of instituting prosecution and insisting on jail sentence." (*Ways & Means Sub-Committee,* Jan. 1952. Hearing, P. 141. Also 30 *Taxes* 357.)

This first pronouncement extended the offer in compromise as contained in Section 3761 of the 1939 Code. On July

2, 1934, a slight change was noted in the policy which was promulgated as follows:

> "In cases in which taxpayers make voluntary disclosures of intentional evasions before investigation by the Bureau has been initiated, the Bureau will not recommend criminal prosecution, but will impose the maximum civil penalties unless there is substantial doubt as to collectibility." (*Ways & Means Sub-Committee hearings,* January 1952, page 142. Also 30 *Taxes* 358.)

The only change from the 1919 announcement was the fact that it was not necessary to make an offer in compromise after July 2, 1934. The Voluntary Disclosure Policy was stepped up in 1945, when the Honorable Fred M. Vinson on August 21, 1945, extended an open public request and invitation to tax evaders and persons who had not made a complete disclosure of all their income to disclose their fraud, which reads as follows:

> "The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return. Monetary penalties may be imposed for delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out'."

This published and public policy of the Treasury Department is admitted by the United States Attorney to be the true and existing policy during all of the times involved in this case. This policy was explained by the then Secretary of the Treasury, Snyder, in a press release dated

May 25, 1947, wherein he added to the Treasury Department's policy by stating:

> "A taxpayer may make a voluntary disclosure and escape criminal prosecution even though his name may appear in an inactive file of suspects." (*Treasury Dept. Press Service S.-341. Balter, Fraud Under Federal Tax Law,* 2nd Ed. 1953, page 102.)

The Treasury Department publicly explained how and in what manner a voluntary disclosure should be made as contained in an address, May 4, 1947, by Mr. J. P. Wenchel, to a radio audience, the then Chief Counsel of the Bureau of Internal Revenue:

> "* * * There is no special form for making the disclosure. The simple statement that: 'I have filed false tax returns and I want to make the government whole,' would constitute a complete disclosure. Of course, it is best usually to present an amended return or other written document as evidence of the disclosure. If possible, the disclosure should be accompanied by payment of the tax which is known to be due, but this is not a prerequisite.
>
> The mere record of a name does not mean that an investigation has been initiated. The fact is that examining officers throughout the country have thousands of names or possible leads. To deny the existence of a voluntary disclosure because we have a name, would be comparable to regarding the telephone book as a dossier of tax evaders." 25 *Taxes* 485, 487.

That the Treasury Department honored the voluntary disclosure of understatement of income and in order to show the great benefits to be gained by making a voluntary disclosure, the then Secretary of the Treasury, John W. Snyder, in the same press release above, dated May 25, 1947, stated:

> "Full understanding of this policy is expected to stimulate voluntary disclosure by repentant taxpayers, similar to a recent case in the Middle West, where a produce firm paid over $1,000,000 in taxes, interest, and civil penalties in order to avoid prosecution." (*Treas. Dept. Press Service S.-341. Balter, "Fraud Under Federal Tax Law,"* 2nd Ed. 1953, page 102.)

J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, also said:

> "Of the $3,000,000,000 collected from taxpayers within the past eighteen months as a result of the current drive against tax evaders, $500,000,000 has been paid on voluntary disclosures." 25 *Taxes* 485 at 487.

The above voluntary disclosure policy was abandoned as noted in an *information service release S-2930,* dated January 10, 1952, by the Secretary of the Treasury, John W. Snyder. At the hearings before the King Committee (page 56), the Commissioner of Internal Revenue stated that the abandonment of the voluntary disclosure policy *did not affect the disclosures made prior to January 10, 1952, because it would infringe upon the taxpayers' constitutional rights.*

Two weeks before May 1, 1951, the date on which Agent Sullivan made a regular examination of the company's books and records for the year 1950, the petitioner had decided to make a voluntary disclosure after conferring with his accountant, Martin F. McQuilkin, at which time Mr. McQuilkin explained to the petitioner the voluntary disclosure policy of the government (R. 39a, 42a).

The voluntary disclosure made by filing amended returns was of the entire amount due and the tax thereon was paid to the government. The petitioner therefore made a good and timely disclosure under the government's policy.

As stated by the Chief Counsel of the Bureau of Internal Revenue, Mr. Wenchel, "It is best usually to present an *amended return.* * * * If possible the disclosure *should be accompanied by payment* of the tax."

The District Court determined there was no voluntary disclosure because petitioner or his accountant, McQuilkin, did not tell Agent Sullivan on May 1, 1951, that they intended to file Amended Income Tax Returns (R. 71a).

The Voluntary Disclosure Policy is recognized by the Courts because it is the threat to break a promise of immunity and is therefore a threat of unconstitutional conduct, in the dissenting opinion in *Lapides vs. United States,* 215 F. 2d, 253:

> "As I understand it, my colleagues agree that, if Lapides could have proved the alleged facts, he would have been entitled to the injunction he sought. For (a) the threat to break such a promise of immunity is a threat of unconstitutional conduct, and (b) an injunction will be granted to prevent a prosecutor from using evidence, in violation of a man's constitutional rights, to obtain that man's indictment."

In the case of *United States v. Shotwell Mfg. Co.* (7th Circuit), decided June 15, 1955 and reported in the Advance Sheets of Commerce Clearing House, page 55,326, Par. 9511 at page 55,334:

> "We hold that defendants made a valid voluntary disclosure in reliance upon promises of immunity. The evidence thereby obtained by the government stands on the same footing as an oral or a written confession induced by such a promise. The use of such evidence at the trial was a violation of each defendant's privilege against being compelled in any criminal case to be a witness against himself, as guar-

anteed by the fifth amendment to the Constitution of the United States."

It is obvious therefore that the rule of law is different in the Seventh Circuit than now exists in the Sixth Circuit.

Again in *In re: Liebster*, 91 F. Supp. 814:

> "Petitioners voluntary disclosure of February 11, 1946, was influenced and induced by the promise of immunity as contained in the announced policy of the Treasury Department."
>
> "The evidence and sworn statement given by the petitioner were also induced and influenced by said promise of immunity."
>
> "The evidence and sworn statement obtained by the agents from the petitioner in January 1947 and on June 5, 1947, respectively, should be suppressed on the ground that if used petitioners rights under the Fifth Amendment of the Constitution would be violated. The petition to suppress the evidence is accordingly granted."

Also *United States vs. Lipshitz*, 132 F. Supp. 519.

After making the voluntary disclosure by filing the Amended Income Tax Returns and to further the confession made at that time, on August 2, 1951, Internal Revenue Agent Ben Lewitt, after telling petitioner that no criminal liability existed and that he wanted to reconcile the figures in the Amended Returns (R. 36a), the petitioner gave him the books of the corporation and 4 or 5 folders containing invoices and payroll record relating to the construction cost of the house.

The Circuit Court's refusal to suppress the evidence at the pre-indictment stage as requested in this case based on the confession obtained as a result of the voluntary disclosure is premised on the decision of *Centracchio vs. Garrity*, 198 F. 2d 382 (2nd Cir.) but is absolutely contrary to

a decision by different judges of the Sixth Circuit Court in the case No. 11904, *Biggs vs. United States,* decided February 19, 1954, on an order on a motion to dismiss appeal:

> "Before SIMONS, Chief Judge; ALLEN and MARTIN, Circuit Judges.
>
> Upon consideration of a motion by the above appellee to dismiss an appeal from an order of the district court overruling a motion to suppress evidence, and upon full hearing on oral argument and the presentation of briefs,
>
> IT IS HEREBY ORDERED that the motion to dismiss be and it is hereby denied, in reliance upon *In Re Fried,* 161 F. 2d 453 (2 Cir.), wherein it was held that a confession obtained in violation of the privilege against self incrimination may be suppressed in advance of indictment. While the government applied for certiorari and the writ was granted, 331 U. S. 804, it was subsequently dismissed on motion of counsel for the government, 322 U. S. 807.
>
> Since upon the hearing it was made clear that the meritorious issue as to the violation of the privilege against self incrimination was not reached in the district court, we see no reason for further argument upon a final hearing upon the appeal, and the cause is remanded to the district court with instructions to pass upon the merits of the motion to suppress the evidence.
>
> It is so ordered."

The promise of the Internal Revenue not to prosecute was upheld in *Rau vs. United States,* 260 F. 131 (C. A. 2, 1919): Defendant had not filed income tax returns for 1916-1917, he was called to office of Collector of Internal Revenue. He executed returns and by certified check paid tax and penalty and was told that by the payment there

would be no proceedings, indictment, nothing would be done whatever:

> "If the defendant in good faith, made the payment of the tax and penalty for the purpose of comprising the impending action, he is entitled to full protection and the benefits derived therefrom. If the money was accepted with the promise of immunity from further punishment in a criminal proceeding, it would be a complete defense to this indictment."

Also *Wellingham v. U. S.*, 208 F. 137 (CA 5, 1913).

That the 4th and 5th Amendments prohibit the use in evidence of confessions, or documents, obtained by means of a promise of immunity has been uniformly enforced by this Court; *Bram vs. United States*, 168 U. S. 532, 557-558:

> "In this court the general rule that the confession must be free and voluntary that is, not produced by inducements engendering either hope or fear, is settled by the authorities referred to at the outset."

Also, *Wilson vs. United States*, 162 U. S. 613, 623:

> "In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort."

The Secretary of the Treasury by his pronouncements and requests for taxpayers to make themselves whole has caused this petitioner, relying on that promise of immunity, to confess his error.

The Supreme Court of the United States has always rejected contentions similar to the one made by the government in this case and has refused to be a partner to such an effort and as Justice Holmes said in the dissenting opinion in *Olmsted v. United States*, 277 U. S. 438 at 470:

> "There is no question that the obtaining of evidence in this manner is dirty business."

The law of England as clearly set out in the case of *Rex vs. Barker,* 2 K. B. 381, is very much the same with regard to confessions obtained as a result of voluntary disclosure policy in income tax cases. The case is reported in *Rex vs. Barker* (1941), 28 Crim. App. Rep. 52:

> "The appellant an accountant and one Robinson who had employed him to prepare his income tax returns were convicted * * * of conspiracy to cheat and defraud the Commissioners of Inland Revenue. * * * As a result of a communication from the appellant enclosing schedules which suggested that there had been irregularities; an interview took place between two representatives of the Board of Inland Revenue who were making investigations, the appellant and Robinson."
>
> HEADNOTE: "At an interview the appellant (an accountant) a person whose income tax returns he had prepared and two representatives of the Inland Revenue Board who were making investigations into alleged irregularities, an extract from Hansards Parliamentary Debates relating to the practice of the Board with regard to voluntary disclosure by fraudulent taxpayers was communicated to the appellant. The extract concluded with these words: 'If * * * the taxpayer forthwith comes forward with a full and frank disclosure of past frauds, this would be accepted by the Board as equivalent to a voluntary disclosure to the extent that the Board would not institute criminal proceedings but would accept a pecuniary settlement.' "
>
> "The appellant thereunder produced various books and documents, which were admitted in evidence on his trial for conspiracy to cheat and defraud the Commissioners of Inland Revenue and for delivery of false statement of accounts for the purposes of the Inland Revenue."

"HELD, that the documents stood on the same footing as an oral or written confession brought into existence as a result of an inducement and ought not to have been admitted in evidence."

III. and IV. Rules of the Sixth Circuit Court of Appeals.

The petitioner had a right to rely upon the published rules of the Sixth Circuit Court of Appeals, which state definitely that the case would not be taken on briefs alone, without oral argument, except by permission of the court on special application made before the case is reached. (Rule 25, CA 6th.) No such application was made. No notice was given to counsel to appear for oral argument, and the case was summarily disposed of on briefs alone.

By so doing the Circuit Court denied the petitioner his right to argue his case as outlined in the second paragraph of the same Rule, which in unequivocal terms state that an appellant shall have the right to open and conclude the argument. If such a Rule is binding upon litigants, it should also be binding upon the Courts if they expect to maintain the respect that is justly due them.

CONCLUSION.

The ruling of the Sixth Circuit Court is at variance with the decision of the Seventh Circuit Court, i.e. *Shotwell* case now being appealed by the Solicitor General, injects uncertainty and inconsistency into the rule of law relating to voluntary disclosures. The question involved being grave and serious should be resolved by this Court.

Since the judgment of the court below also ignores the mandate of this Court reiterated time after time, relating to the immunities from search and seizure without warrants or subpoenae and because the Sixth Circuit decision in effect forces the petitioner herein to be an unwilling wit-

ness against himself, the decision of the Sixth Circuit should be reversed and the rights and immunities of the petitioner that he has been unlawfully deprived of be restored to him. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A.

Memorandum Opinion of the District Court.

(Filed March 29, 1955.)

JONES, *J.*:

There is need for prompt disposition of this matter and while the facts are fresh in mind it will be well to set down briefly my findings and conclusions on the issues.

I think there is no doubt that suit to enjoin the use of evidence unlawfully seized or taken, properly may be commenced at this stage of the proceedings if timely brought, and that the court summarily determine whether the evidence should be suppressed.

Decision here will be limited to the precise issues presented; First, whether the plaintiff is entitled to immunity from criminal prosecution in view of his alleged disclosure made by the filing of amended income tax returns, relying upon the Commissioner of Internal Revenue's policy with reference to voluntary disclosures, and, second, whether the Government made an illegal search and seizure of plaintiff's records, intending to make use of them for the purpose of prosecuting him under the criminal statutes.

If the answer to the first question is in the affirmative, decision on the second is not important. If the Treasury policy was binding on the Government and the plaintiff made a voluntary disclosure within the meaning of the policy, the evidence would have to be suppressed regardless of how it was secured. If the answer is in the negative, it becomes a question of the legality of obtaining the evidence sought to be used before the Grand Jury. The case turns largely upon the facts. There is no substantial dispute as to the law, except as it bears upon the legal effect of the so-called "voluntary disclosure" policy of the Treasury Department then in existence, but long since

abandoned. I doubt that such a policy granting immunity from criminal prosecution would be binding upon the Government. There are provisions in the law permitting both civil and criminal tax liabilities to be compromised, Title 26 U. S. C., Section 3761.

However, reliance on the policy might create a situation calling for moral forbearance where the conditions existed and a taxpayer complied fully with the provisions and brought himself clearly within the intent and meaning of the policy.

Thus, while I think it doubtful that the policy of the Commissioner, without Congressional sanction, could bind the Government, nevertheless, a careful and full compliance with it by a taxpayer in some circumstances conceivably might present a potential defense to later prosecution; but I can not find, under the facts before me, that the taxpayer here now is entitled to immunity from the Government's Grand Jury investigation and consideration of his returns for the years in question. As accountant McQuilkin and the plaintiff testified, nothing was said to Revenue Agent Sullivan about the purpose to file amended returns, although they had had contacts and talks with him a few days before the filing of the amended returns, on May 8th. The filing of amended returns under the circumstances presented by the evidence in this case hardly constituted a voluntary disclosure within the meaning of the Commissioner's proclamation. Asserted reliance upon the Commissioner's policy does not seem to me to be consistent with the failure to make the disclosure to Agent Sullivan that amended returns shortly were to be filed, as contemplated by the language of the policy, as follows: "And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out.' "

Plaintiff asserts the fact that Revenue Agent Sullivan was not told on May 1, 1951 that amended returns were contemplated or being prepared at that time, lends support to the voluntary character of the disclosure of unreported income in the guise of the amended returns filed seven days later, or May 8, 1951; and this for the reason that Sullivan had for practical purposes completed his investigation of the original 1950 return and given, what plaintiff called, "a clean bill of health." Thus no investigation actually was being made by the revenue agents at the time the amended returns were filed.

But, I question the validity of such contention. If the filing of the amended returns, under the circumstances disclosed by the evidence here, constituted a voluntary disclosure entitling the plaintiff to immunity from criminal prosecution, it would not, in my opinion, have impaired plaintiff's position to have made a clean breast of the matter to Sullivan on May 1st. Such action would have had a stronger appeal for absolution, if it then were legally available.

As bearing upon the background of Agent Sullivan's favorable report on the 1950 return it will be of interest to recall Sullivan's testimony as to his talk with Benes on May 1, 1951 respecting the acquisition of his residence and the correctness of the 1950 income return.

Although denied by Benes, Revenue Agent Sullivan testified that he asked Benes about the cost of the new residence, to which Benes replied, from $80,000 to $100,000; asked how it was paid for, to which Benes replied, by selling his old residence and with borrowed money, but did not use corporation money or credit to buy it; that Benes said the correct income had been reported; Sullivan confirming Benes' and McQuilkin's testimony that nothing was said about the then existing determination to file amended returns for 1947, 1948, 1949 and 1950.

If Agent Sullivan's testimony is believed, it reflects a conscious and deliberate deception at a time when the taxpayer was preparing amended returns as a potential means of escape from the criminal consequences of his false original returns, so recently examined by Agent Sullivan.

The weakness of plaintiff's contention in that respect further partially lies in the fact that the change in the corporate books to reflect the change in the amended returns was not made until some time after the filing of the amended returns, thus, Agent Sullivan never had, or was given a chance to inspect or examine books and records that disclosed the truth. Whatever Agent Sullivan may have said to Benes about accepting the returns or giving a clean bill of health related to the original return for the fiscal year 1950, not the intended amended returns of which he, Sullivan, knew nothing at that time.

What has been said relates to the E. J. Benes & Company, Inc. There is no evidence to support a disclosure in the case as to the returns of E. J. Benes as an individual. No amended returns were filed by him.

Whether there was an unlawful search and seizure by Revenue Agent Lewitt entirely depends upon the evidence and the credibility of the witnesses. Benes testified that he gave no authority or consent to anyone to examine the so-called home files; but had given Lewitt permission to make a limited inspection of certain records. Lewitt testified that Benes did give him the right to examine the books and records and that other records essential to the verification of the amended returns would be made available to him. He denied that he examined any books or records, or removed any books or records, without permission. It was only natural for the agents to wish to examine the Company's records and books for verification, following the very substantial change of income reported in the amended returns

over the originals,—how else would the agent determine the accuracy of the income reported in the amended returns? On the facts presented, I am unable to find that there was an unlawful search and seizure of the plaintiff's records.

The facts in the *Guerrina* case, 112 F. Supp. page 126, relied upon by plaintiff, are not at all parallel to those presented here and it clearly was a fact issue in that case. It seems to me that counsel is confused in this reference since examination of the plaintiff's books by Sullivan only was completed in respect of the original 1950 return. Agent Lewitt's examination of the books and records was directed to and made necessary by the filing of the very substantially different and amended returns. At the time Sullivan was examining and investigating the original return for 1950, on May 1, 1951, the evidence of the plaintiff is that it had been determined, as early as March or April, 1951, to file amended returns for 1947, 1948, 1949 and 1950, but that the accountant, Mr. McQuilkin, was unable because of other pressing matters to prepare and file amended returns until May 8, 1951.

The publication of the policy by the Commissioner was not intended as a trap, but undoubtedly was a well-meaning attempt to influence taxpayers to make honest returns even to the extent of holding out, under stated circumstances, immunity from criminal prosecution.

The taxpayer here was not entrapped by the Revenue agents into making a voluntary disclosure relying upon the policy, and then recommending prosecution on the basis of the false original return. In this case the agents made no inducements and no promises to influence the disclosure.

Having to make a choice of the more credible account of the examination and investigation made of the plaintiff's books and records, I am unable to say that the in-

vestigation and examination of the plaintiff's books, records and files by Revenue Agent Lewitt were unlawful or in disregard of the Commissioner's policy, or the plaintiff's rights. The fact is that the weight of the evidence supports the Government's position that the inspection and examination of the plaintiff's records were made under voluntary permission of Benes as the chief officer of the company.

From what has been said, it is my considered judgment that the plaintiff is not entitled to the benefit of the so-called voluntary disclosure policy, nor to the relief prayed for. An order may be entered dissolving the preliminary injunction.

JONES,

United States District Judge.

March 29, 1955.

If findings and conclusions are by Rule required in a case of this character, I find:

1. That there was no voluntary disclosure in respect of mistakes or errors in the income returns of E. J. Benes & Company, Inc., within the provisions or the meaning of the so-called Commissioner of Internal Revenue policy, either before or after investigation was commenced;

2. That there was no unlawful search and seizure of the Benes Company's books and records, nor any unlawful use intended to be made thereof by the Government.

My conclusion is that the plaintiff is not entitled to injunctive relief and that the temporary restraining order heretofore entered should be dissolved.

JONES,

United States District Judge.

APPENDIX B.

Opinion of the United States Court of Appeals For the Sixth Circuit.

(Filed July 20, 1955.)

Before SIMONS, *Chief Judge*; MILLER and STEWART, *Circuit Judges.*

MILLER, Circuit Judge. Appellant by this action sought to enjoin the United States Attorney for the Northern District of Ohio from using before the United States Commissioner, or the Grand Jury, or in any criminal proceeding, certain books and records of the appellant individually and of the E. J. Benes & Company, a corporation of which he was president, which appellant claims were illegally obtained by government agents. He asked that such documents be suppressed as evidence.

The claimed illegality is that appellant, relying upon the "voluntary disclosure" policy of the Secretary of the Treasury then in existence, filed amended income tax returns for E. J. Benes & Company for the fiscal years ending May 31, 1947, 1948, 1949 and 1950 and that an agent of the Internal Revenue Department thereafter came to the office of the corporation and under the scheme and subterfuge of verifying the disclosures contained in the amended tax returns for tax purposes only without criminal liability, examined the files and records in the office, through which he obtained the evidence which the Government is now planning to use in criminal prosecutions against him. As a second and independent ground of illegality, appellant claims that the agent, without the consent of the appellant or any other officer or agent of the corporation, and without a search warrant, searched through appellant's personal files and records as well as those of the corporation in violation of the Fourth Amend-

ment of the U. S. Constitution, thereby obtaining the evidence which appellant now seeks to suppress.

Appellant's complaint alleges that thereafter a criminal complaint was filed with the U. S. Commissioner charging appellant with violation of the Internal Revenue Code with respect to his personal income tax return for the year 1947; that the U. S. Attorney intends and will present to the Grand Jury evidence to obtain indictments against appellant with respect to the filing of income tax returns by him personally and as principal officer of the corporation for the years 1947, 1948, 1949 and 1950; and that unless restrained from so doing will use the documents and information obtained by the Internal Revenue Agent in the examination above referred to.

After the granting of a temporary restraining order by the District Judge a hearing was held where the issues were fully developed by testimony. Thereafter the District Judge dissolved the temporary restraining order and sustained appellee's motion to dismiss the complaint. This appeal followed.

The District Judge in an opinion in support of the ruling expressed doubt that the Treasury policy granting immunity from criminal prosecution if a taxpayer made a voluntary disclosure of omission or other misstatement in his income tax return would be binding upon the Government without Congressional sanction. It will be noted that the declaration of policy said: "The Commissioner of Internal Revenue does not *recommend* criminal prosecution * * *" (italics added). However, he recognized that a careful and full compliance with such a publicly stated policy by a taxpayer might under some circumstances create a situation calling for moral forbearance or present a potential defense to a later prosecution, and did not rest his ruling upon that ground. He found as a

fact that the filing of the amended returns under the circumstances presented by the evidence did not constitute a voluntary disclosure within the meaning of the Commissioner's proclamation in that the evidence failed to sustain appellant's contention of reliance upon the Commissioner's policy in filing the amended returns. He also held that the evidence failed to sustain appellant's contention that the Internal Revenue agent examined the files and records of the corporation without permission.

We are of the opinion that while the issue of unlawful search and seizure is properly raised by this proceeding and before us on this review, the competency or incompetency of the evidence obtained through appellant's claimed reliance upon the Treasury's "voluntary disclosure" policy should not be determined in a *pre-indictment* proceeding of this kind. Rule 41(e), Rules of Criminal Procedure; *Centracchio v. Garrity,* 198 F. (2d) 382, C. A. 1st, cert. denied 344 U. S. 866; *Chieftain Pontiac Corp. v. Julian,* 209 F. (2d) 657, C. A. 1st. cf. *White v. United States,* 194 F. (2d) 215, C. A. 5th; *United States v. Thompson,* 251 U. S. 407, 413-415. The reasons for such a ruling are fully discussed in *Centracchio v. Garrity, supra,* and need not be repeated here.

The ruling upon the issue of unlawful search and seizure depended largely upon the proper interpretation to be given to certain testimony of the appellant together with an evaluation of the credibility of the witnesses. Following the filing on May 8, 1951 of amended income tax returns for the corporation for the years 1947, 1948, 1949 and 1950, an agent of the Internal Revenue Department came to appellant's office about August 2, 1951, introduced himself to appellant and stated that he wanted to check the amended returns. Appellant took him to his accountant's office in the same building whom he in-

structed to turn over to the agent certain files and corporation books which were in the accountant's possession. The information contained in those records would not have been sufficient to support a criminal prosecution. Appellant testified that he did not authorize the accountant or any person in appellant's office to turn over any other information to the agent, but that upon returning to his office some days later he saw the agent going through files in the office that had not been turned over to him. On this particular point appellant testified as follows:

> "Q. Who else was in the office at that time?
> A. Mr. Baldwin.
> Q. Now when you came in the office what did you do when you saw Lewitt at the files?
> A. I saw him at the files, at which time he immediately closed the file drawer, put on his hat and walked out. I immediately went to Mr. Baldwin and asked him if he had given anyone permission to go into the files.
> Q. Had you given anyone permission?
> A. No, sir."

Baldwin testified that he saw a man whom he did not know at the files in the office when he returned from lunch, that he had no conversation with him, didn't pay any particular attention to him, and had not given him any permission to examine the files. Appellant's secretary testified that on one occasion the agent came into the office when appellant was not there and asked for some records, which she gave to him; that she had not received any instructions, had not been instructed not to give him the books and records, and thought it was all right; that on another occasion she returned from lunch and saw the agent in the files, and that he continued to go through the files for some fifteen to forty-five minutes longer. The

filing cabinets had locks on them with keys in the possession of appellant and his secretary.

On cross-examination, appellant admitted that the agent told him that he wanted to examine the books and records necessary in order to check the amended returns; that he had not issued any instructions to anyone not to permit him to examine the files; that after seeing the agent at the files he did not tell him that he objected to his examining the files; that there were not any files he was unwilling to have the agent inspect; and that had the agent asked for permission he would have been allowed to see any records he desired.

The agent testified that he asked appellant for permission to examine all of the records when he first talked with him at his office; that it was understood between them that appellant would advise his personnel that he was authorized to go into the files; that in order to make an audit it was necessary to go into the files and records in the office and that he asked permission from the office girl to do so; and "Well, I am certain that I was authorized to be there because no one ever made any objection nor ever told me that I wasn't to look at anything, any record of any kind."

In our opinion, the ruling of the District Judge that the evidence so obtained from the files in appellant's office was not obtained through an illegal search and seizure, is amply supported by the evidence, *Campbell v. United States,* 151 F. (2d) 605, C. A. 6th; *Bilodeau v. United States,* 14 F. (2d) 582, 585, C. A. 9th, cert. denied 273 U. S. 737; *Lisansky v. United States,* 31 F. (2d) 846, 851, C. A. 4th; *Bowles v. Joseph Denunzio Fruit Co.,* 55 F. Supp. 9, 11, W. D. Ky., and should not be disturbed on appeal. *Poetter v. United States,* 31 F. (2d) 438, 439, C. A. 9th.

The judgment of the District Court is modified so as to make the dismissal of the action without prejudice to a later ruling at the proper time by the District Judge on the alleged incompetency of the evidence by reason of appellant's reliance upon the "voluntary disclosure" policy of the Treasury, *Centracchio v. Garrity, supra,* and as so modified is affirmed.

APPENDIX C.

Judgment of United States Court of Appeals For the Sixth Circuit.

(Filed July 20, 1955.)

Before: SIMONS, *Chief Judge*, MILLER and STEWART, *Circuit Judges.*

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was briefed by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby modified, and as so modified, is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 473

ELMER J. BENES, PETITIONER

v.

SUMNER CANARY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (Pet. 23–28) has not been reported. The opinion of the Court of Appeals (Pet. 29–34) is reported at 224 F. 2d 470.

JURISDICTION

The judgment of the Court of Appeals was entered July 20, 1955 (Pet. 34), and the petition for certiorari was filed on October 18, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence justified the trial court's finding that petitioner consented to an

examination of his books and records by a revenue agent.

2. Whether the question of the admissibility of certain evidence, obtained by the Government as the result of petitioner's alleged reliance on the Treasury Department's "voluntary disclosure" policy, may be raised by a pre-indictment proceeding to suppress or return the evidence.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 41. *Search and Seizure.*

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * * *

STATEMENT

On March 12, 1954, a criminal complaint was filed with the United States Commissioner in the

Northern District of Ohio charging petitioner with a violation of the Internal Revenue Code. (R. 5a.) On April 12, 1954, petitioner filed a complaint in the District Court asking injunctive relief against respondent, the United States Attorney. Petitioner alleged (1) that he had produced incriminating documents, in reliance on the "voluntary disclosure" policy of the Treasury Department,[1] by filing amended income tax returns for a corporation of which he was president, and by submitting the books of the corporation and certain of its records for examination by a revenue agent; and (2) that a revenue agent had obtained further evidence by searching through his personal files and records without a warrant and without consent. Petitioner asked that the United States Attorney be restrained from using these books and records before the grand jury, that they be suppressed, and that they be returned to him. (R. 3a–7a.) After a hearing the complaint was dismissed. (R. 75a.) On July 20, 1955, the Court of Appeals affirmed the judgment of the District Court, but without prejudice to petitioner's right to raise the "voluntary disclosure" issue again after an indictment should

[1] Statements of Treasury officials defining this policy will be found in the record in *United States* v. *Shotwell Manufacturing Co.*, No. 470, this Term, at pages 3125–3142.

have been returned against him.[2] (Pet. 31, 34.)

The evidence to support the denial of the requested relief may be summarized as follows:

Petitioner is president of a corporation which constructs commercial and industrial buildings. (R. 40a.) During 1947, 1948, 1949 and 1950 the corporation built a personal residence for petitioner at a cost of approximately $176,000. (R. 38a, 41a, 3b–4b.) However, the invoices and other original records of these expenditures were kept in a separate "house file"; the expenditures were charged on the corporation's books to various other jobs upon which the corporation was engaged; and the original corporate returns were prepared from the books and without reference to the "house file." (R. 16a–17a, 32a–33a, 41a.) Consequently, the original corporate returns showed no income from the construction of petitioner's residence. (R. 57a, 3b–4b, 8b.)

In April 1951 petitioner took the "house file" to McQuilkin, the accountant who had prepared his returns; McQuilkin explained the "voluntary disclosure" policy to him; and he directed McQuilkin to prepare amended corporate returns to reflect additional income from the construction

[2] On September 12, 1955, two indictments were returned charging petitioner with willful attempted evasion of his own income taxes and those of the corporation for the years 1947, 1948, 1949 and 1950 in violation of Section 145 (b), Internal Revenue Code of 1939.

of the residence. (R. 13a, 41a–42a.) On May 1 Revenue Agent Sullivan went to the corporation office to check the 1950 return against the books.[3] He was given all records and information he requested, but he was not given the "house file" and neither petitioner nor McQuilkin mentioned that amended returns were being prepared. Petitioner stated that both the corporate returns and his own personal returns were accurate; that the personal residence had cost him about $80,000 to $100,000; and that none of this money had come from the corporation. When his examination showed that the books were in substantial agreement with the return, Sullivan told petitioner that he would have to check certain adjustments with McQuilkin but that in all probability the return would be accepted as correct. (R. 17a–18a, 54a–61a, 21b–23b.) On May 8, before Sullivan had an opportunity to confer with McQuilkin on the adjustments, the amended corporate returns were filed showing additional income of about $176,000 from the construction of the residence. (R. 15a, 16a, 57a, 3b–4b.) The books of the corporation were subsequently altered to show the expenditures on the residence as advances to petitioner personally. (R. 2b, 8b.)

In July the amended returns were assigned to Revenue Agent Lewitt and on August 2 he went

[3] The return had been assigned to Sullivan in January. (R. 54a.)

to the corporation's office to begin examination of the books. (R. 51a–52a.) He warned petitioner at the outset that the investigation might have serious consequences.[4] (R. 13b, 20b.) When he asked for the necessary data petitioner said that anything he needed would be made available to him. (R. 12b–13b.) Lewitt testified (R. 18b–19b):

> Mr. Benes explained to me that he wasn't around that office all the time, that his business required him to be away a great deal of the time. He told me that I could come up there and get whatever is necessary even though he may not be present. And it was for his convenience that I proceeded in that manner.

Petitioner directed McQuilkin to give the corporation's books and the "house file" to the agent. (R. 15a.) At no time did Lewitt examine any books, records or files without permission; at no time did anyone object to his method of inspecting the files; and he was allowed to take certain records away from the office, from which alone he could have determined the corporation's understatement of its income.[5] (R. 52a–53a, 14b–17b.)

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[4] He denied that he had told petitioner that he need not worry about criminal prosecution. (R. 14b.)

[5] Petitioner admitted on cross-examination that he was willing to let Lewitt examine any records he might wish to see. (R. 46a–49a.)

On the basis of this evidence the District Court found that petitioner had not made a voluntary disclosure within the meaning of the policy, and that Agent Lewitt's examination of the records had been consented to by petitioner and did not constitute an illegal search. (Pet. 28.) The Court of Appeals held that the finding as to the legality of Lewitt's search was amply supported by the evidence. (Pet. 33.) But the court held that the issue of the competency of evidence obtained through petitioner's alleged reliance on the voluntary disclosure policy could not be raised by a pre-indictment proceeding to suppress evidence, and the judgment was, therefore, affirmed without prejudice to petitioner's right to raise this issue again after indictment. (Pet. 31, 34.)

ARGUMENT

1. There is no merit to the contention (Pet. 7–12) that Revenue Agent Lewitt inspected the files in the corporation's office and took certain records without petitioner's permission. Lewitt clearly and unequivocally testified that petitioner gave him blanket permission at the very outset of his investigation (*supra,* p. 7). This is supported by petitioner's own admission that he was perfectly willing to let the agent see any records he might wish to examine (R. 46a–49a), and by the statement of petitioner's secretary that she supposed petitioner had instructed her to let Lewitt see the books and records and that there

was no reason why she should not do so (R. 27a–28a). The trial court found (Pet. 26–28) that Lewitt's account of the permission given him to examine the files was more credible than petitioner's, and that, on Lewitt's testimony, there could be no question of the legality of his search. The trial court's finding of fact is fully supported by the evidence and the Court of Appeals (Pet. 33) correctly refused to set it aside. *United States* v. *Johnson,* 327 U. S. 106, 111–112, 113; *United States* v. *Johnson,* 319 U. S. 503, 518; *Helvering* v. *Kehoe,* 309 U. S. 277; *Delaney* v. *United States,* 263 U. S. 586, 589–590; *White* v. *United States,* 194 F. 2d 215, 217 (C. A. 5th), certiorari denied, 343 U. S. 930; *Coupe* v. *United States,* 113 F. 2d 145, 148 (C. A. D. C.), certiorari denied, 310 U. S. 651.

2. The court below also correctly held (Pet. 31) that the question of the admissibility of petitioner's alleged voluntary disclosure could not be raised in a pre-indictment proceeding. This aspect of the case did not involve a search or seizure. It involved only the admissibility of material voluntarily given by petitioner to aid in the computation of the corporation's correct taxes. Even if the furnishing of the data came within the Treasury Department's policy (which we deny), the attempt to determine their admissibility prior to indictment is premature and constitutes an innovation in criminal procedure which

is unauthorized by the provisions of Rule 41 (e), *supra*, p. 3. *Centracchio* v. *Garrity*, 198 F. 2d 382, 386–388 (C. A. 1st), certiorari denied, 344 U. S. 866; *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657 (C. A. 1st); *Eastus* v. *Bradshaw*, 94 F. 2d 788 (C. A. 5th), certiorari denied, 304 U. S. 576. "Judicial interference of this sort with the action of a United States attorney in the administration of the criminal law, at a pre-indictment stage, must, we think, be regarded as the exception rather than the rule. Cf. *United States* v. *Thompson*, 251 U. S. 407." *Centracchio* v. *Garrity*, *supra*, p. 387. Moreover, the sanctioning of such pre-indictment inquiries into the admissibility of evidence would constitute a serious inroad upon the principle of finality "forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy." *Cobbledick* v. *United States*, 309 U. S. 323, 325; cf. *Stefanelli* v. *Minard*, 342 U. S. 117, 123–124. Petitioner's remedy lies in an objection to the evidence when the Government attempts to introduce it at the trial. Since the opinion of the court below does not reach the merits of the voluntary disclosure issue, there is no conflict with *United States* v. *Shotwell Manufacturing Co.*, 225 F. 2d 394 (C. A. 7th), now pending on the Government's petition for certiorari, No. 470, this Term.

Nor does the decision below conflict with *In re Fried*, 161 F. 2d 453 (C. A. 2d), certiorari

granted, 331 U. S. 804, writ dismissed, 332 U. S. 807, which involved a pre-indictment application to suppress confessions obtained after prolonged interrogation of the defendants while under arrest. There was no arrest in this case; and there was no confession, for petitioner makes it clear (Pet. 3–4) that he never admitted that the additional income had been omitted from the corporation's original return with *wilful intent* to evade taxes. The language of the First Circuit in the *Centracchio* case is applicable here (198 F. 2d, p. 387):

> The Fried case, even if correctly decided, is no authority for appellant in the present case, for here it is clear that there has been no coerced confession by petitioner in violation of his constitutional right. The information supplied by petitioner was voluntarily given to aid in the computation of his income tax liability.

The decision in *Lapides* v. *United States,* 215 F. 2d 253, 255, 262–263 (C. A. 2d), and the unreported order of the court below in *Biggs* v. *United States,* No. 11904, decided February 19, 1954, upon which petitioner relies (Pet. 16, 17–18), are also distinguishable since they appear to involve actual confessions made in reliance on the voluntary disclosure policy. In *White* v. *United States, supra,* the question of the prema-

turity of a pre-indictment proceeding to suppress an alleged voluntary disclosure was not raised.[6]

CONCLUSION

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] There is no merit to the additional contention (Pet. 21) that the Court of Appeals was required to grant oral argument. "* * * it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it." *United States* v. *Breitling*, 20 How. 252, 254. See also *National Labor Relations Board* v. *Monsanto Chemical Co.*, 205 F. 2d 763, 764 (C. A. 8th). Here, the Court of Appeals was justified in deciding the case with dispatch in view of the fact that the statute of limitations was running on the earliest years involved.

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